IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK CLAUSER, JOHN WOLLMAN, and VINCENT TRIPPY, individually and on behalf of others similarly situated, Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 99-5753
NEWELL RUBBERMAID, INC. et al., Defendants.	:	

Memorandum and Order

YOHN, J. July , 2000

Frederick Clauser ("Clauser"), John Wollman ("Wollman"), and Vincent Trippy ("Trippy") instituted this action on behalf of themselves and others similarly situated (collectively "plaintiffs") against Newell Rubbermaid, Inc. ("Newell"), Koh-I-Noor, Inc. ("KIN"), and three pension plans (collectively "defendants"). The action was instituted pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq*. ("ERISA"), and seeks to enforce the termination provisions of a pension plan, to effect the distribution of plan assets, and to hold liable defendants for breach of fiduciary duty. The individual plaintiffs move the court to certify the action as a class action pursuant to Federal Rule of Civil Procedure 23. Although defendants have not opposed the motion, I have reviewed the class complaint, the motion, and the relevant law. I conclude that class certification is proper and that the individual plaintiffs are proper class representatives.

BACKGROUND

In 1919, KIN was established in New York. *See* 2d Amend. Class Action Compl. ¶ 21 (Doc. No. 8) [hereafter "2d Amend. Compl."]. In 1970, KIN became a wholly owned subsidiary of Rotring GmbH, a German corporation. *See id.* ¶ 22. On January 1, 1974, KIN established a pension plan to benefit its employees. *See id.* ¶ 24. The plan was amended and restated on January 1, 1987, and was amended three times thereafter. *See id.* ¶ 25. In this action, it is known as the KIN Plan. *See id.* ¶ 25. The KIN Plan was frozen as of April 30, 1996. *See id.* at ¶ 26. No contributions were made to the plan for the years after 1995. *See id.* ¶ 27. On April 25, 1997, KIN announced that the KIN Plan would terminate on July 1, 1997. *See id.* ¶ 28. Plaintiffs allege that KIN and the KIN Plan "took all of the mandated regulatory actions necessary to terminate the KIN Plan, and required only regulatory approval prior to distribution of the KIN Plan assets," which would have been forthcoming. *See id.* ¶¶ 29-32. Pursuant to the provisions of the KIN Plan, the plan assets, including residual assets exceeding $1,000,000, would be distributed to plan participants and beneficiaries upon termination. *See id.* ¶¶ 30-31 & 49-50. Disbursement of assets was scheduled for May 28, 1998. *See id.* ¶ 30. The assets were not, however, disbursed.

Prior to June of 1998, negotiations were entered by which Newell sought to acquire Rotring GmbH, its assets, and its subsidiaries, including KIN. *See id.* ¶ 33. Because Newell wanted the assets of the KIN Plan, and because Rotring wanted to be acquired by Newell, Rotring and Newell directed KIN not to terminate the KIN Plan. *See id.* ¶¶ 34-35. While acting as KIN Plan Administrator, the KIN board of directors voted to rescind the termination of the

KIN Plan on June 25, 1998. *See id.* ¶¶ 36-38. Plan participants were advised that the decision to rescind the termination had been made in light of prevailing market conditions and depressed interest rates. *See id.* ¶ 42. On October 1, 1998, Newell assumed control of Rotring GmbH, and therefore of KIN, too. *See id.* ¶ 44. Newell proceeded to liquidate KIN, reducing it from a corporation with over 300 employees and annual gross revenues approximating $50,000,000 on December 31, 1998, to a corporation employing fewer than 25 persons with no revenue at the filing of the complaint. *See id.* ¶¶ 23 & 45-46. About October 8, 1999, KIN Plan members were informed by the KIN Plan Committee, on Newell stationery, that the KIN Plan would be merged into two Newell pension plans by the end of 1999.[1] *See id.* ¶ 47.

On November 18, 1999, plaintiffs filed a complaint alleging that defendants breached their fiduciary duty as KIN Plan Administrator by rescinding termination and alleging that, by its terms, the KIN Plan terminated, rendering any merger with the Newell Plans a violation of both the KIN Plan and ERISA. *See* Compl. (Doc. No. 1). The complaint sought declaratory and injunctive relief, damages, interest, costs, fees, and an order preventing the merger of the KIN Plan with the Newell Plans. *See id.* A first amended complaint was filed on November 23, 1999. *See* 1st Amend. Compl. (Doc. No. 3). On December 2, 1999, plaintiffs moved for a temporary restraining order and a preliminary injunction. *See* Pl. Mot. for TRO and Prelim. Inj. (Doc. No. 4). On December 10, 1999, the court held a hearing at which it was agreed that plaintiff would withdraw the motion in exchange for the promise of Newell and the Newell Plans to join the action as defendants. *See* Doc. Nos. 5 (minute entry of hearing of Dec. 10, 1999), 6

[1] The "Newell plans" are the Newell Pension Plan for Factory and Distribution Hourly Paid Employees and the Newell Pension Plan for Salaried and Clerical Employees. *See* 2d Amend. Compl. ¶ 15.

(Order of Dec. 15, 1999, disposing of plaintiffs' motion), & 7 (transcript of hearing of Dec. 10, 1999); *see* also 2d Amend. Compl. ¶ 15. On December 23, 1999, plaintiffs filed a second amended complaint, adding the Newell Plans as defendants and renewing their claims. *See* Doc. No. 8).

On January 7, 2000, plaintiffs filed a motion for class certification. *See* Pls. Mot. to Certify a Class (Doc. No. 12) [hereafter "Pls. Mot."]. Defendants have not opposed the motion. Considering plaintiffs' factual averments in light of the relevant law, I will grant the motion to certify the class action, reminding the parties that I have both the discretion and the duty to reassess the certification decision until final judgment is entered. *See* Rule 23(c); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 1760 (1999).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 informs my consideration of a motion to certify a class action. In order to obtain class certification, those seeking certification must demonstrate that all four prerequisites of Rule 23(a), and at least one part of Rule 23(b), have been satisfied. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 162-63 (1974); *Barnes*, 161 F.3d at 140; *In re Prudential Ins. Co. of Am. Sales Pracs. Litig.*, 148 F.3d 283, 308-09 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 890 (1999); *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). Moreover, a court may only certify a class "after a rigorous analysis." *General Tele. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Nonetheless, in deciding a motion for certification of a class action, the court does not

examine the merits of plaintiffs' underlying claims. *See Eisen*, 417 U.S. at 177-78; *Barnes*, 161 F.3d at 140. The court has the discretion and the duty to reassess a class certification decision as the litigation proceeds. *See* Fed. R. Civ. P. 23(c)(1) & (4); *Barnes*, 161 F.3d at 140.

DISCUSSION

Plaintiffs seek certification of a class comprised of "all the participants and beneficiaries of the KIN Plan which includes approximately 617 members as of December 31, 1998, all being current or former employees of KIN or their beneficiaries." *See* 2d Amend. Compl. ¶ 18.

I. RULE 23(A): PREREQUISITES TO A CLASS ACTION

Before a class may be certified, Federal Rule of Civil Procedure 23(a) mandates a showing of numerosity, commonality, typicality, and adequacy of representation. Specifically, the rule provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Although these four prerequisites overlap, the Third Circuit has noted that there is a conceptual distinction between the first two prerequisites—numerosity and commonality—which evaluate the sufficiency of the class itself, and the last two

prerequisites—typicality and adequacy of representation—which evaluate the sufficiency of the named class representatives. *See Hassine v. Jeffes*, 846 F.2d 169, 176 n.4 (3d Cir. 1988). I will consider each of these prerequisites in turn.

A. Numerosity

Rule 23(a)(1) requires a potential class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). When class size is large, numbers alone are generally dispositive. *See* 1 Newberg on Class Actions § 3.03, at 3-17 (3d ed. 1992) ["Newberg"]. For example, "the numerosity requirement is [generally] satisfied where the class exceeds 100 members." *Kromnick v. State Farm Ins. Co.*, 112 F.R.D. 124, 126 (E.D. Pa. 1986). Nevertheless, Rule 23(a)(1) "is not a numerosity requirement in isolation." 1 Newberg § 3.03, at 3-10. This rule imposes an "impracticability of joinder requirement, of which class size is an inherent consideration within the rationale of joinder concepts." *Id.* at 3-11. A court must evaluate the practicability of joinder in the context of the particular litigation. *See Gurmankin v. Costanzo*, 626 F.2d 1132, 1135 (3d Cir. 1980). The court is to be guided by common sense in this regard. *See In re IKON Office Solutions, Inc., Secs. Litig.*, 191 F.R.D. 457, 462 (E.D. Pa. 2000) [hereafter "In re IKON"].

Plaintiffs allege that the class is comprised of more than 600 persons, "and the whereabouts of all of the class members is not now known by the individual plaintiffs." *See* 2d Amend. Compl. ¶ 19(a); Pls. Mot. at 6. Regarding the impracticability of joinder, the class is materially indistinguishable from other ERISA classes certified in this district. *See In re IKON*

Office Solns. Inc., Secs. Litig., 191 F.R.D. 457, 462 (E.D. Pa. 2000) (finding "the numerosity standard is easily met" by a class of ERISA plaintiffs numbering "thousands of participants in the plan in any given year") [hereafter "*In re IKON*"]; *Feret v. Corestates Fin. Corp.*, 97-6759, 1998 U.S. Dist. Lexis 12734, *21 (E.D. Pa. Aug. 18, 1998) (certifying ERISA class of over 200 plaintiffs); *Bunnion v. Consolidated Rail Corp.*, 97-4877, 1998 WL 372644, *3 (E.D. Pa. May 14, 1998) (finding class of about 600 persons meets numerosity requirement). In light of the number of class members and the nature of the action, I conclude that plaintiffs' class is so numerous as to make joinder impracticable.

B. Commonality

As a prerequisite to class certification, Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." *See* Fed. R. Civ. P. 23(a)(2). This commonality requirement will be satisfied "if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *See Baby Neal*, 43 F.3d at 56; *see also Barnes*, 161 F.3d at 140 n.15 (finding no error in such a standard). Common questions are those which arise from a "common nucleus of operative facts." *See Kromnick*, 112 F.R.D. at 128 (internal quotation marks omitted). Because Rule 23(a)(2) requires only a single issue common to all members of the class, the requirement is easily met. *See Baby Neal*, 43 F.3d at 56; *In re IKON*, 191 F.R.D. at 463; 1 Newberg § 3.10, at 3-50. Commonality is not defeated by a showing that "individual facts and circumstances" will have to be resolved. *See Baby Neal*, 43 F.3d at 57; *In re IKON*, 191 F.R.D. at 463.

"[T]he appropriate 'focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs.'" *See In re IKON*, 191 F.R.D. at 465 (quoting *Bunnion*, 1998 WL 372644 at *6). Consequently, common questions of fact and law exist as to whether defendants are in fact fiduciaries as to KIN Plan participants and beneficiaries, and as to whether defendants conducted themselves in a manner incompatible with their fiduciary duty. Moreover, common questions of law and fact exist as to whether the KIN Plan terminated and as to whether, under the plan and ERISA, participants and beneficiaries are entitled to distribution of KIN Plan assets. That the dollar amount of individual entitlements will vary is not fatal to the class action. *See In re IKON*, 191 F.R.D. at 464; *Feret*, 98 U.S. Dist. Lexis 12734 at *29-30. Although plaintiffs needed to present only one common question of law or fact, plaintiffs have presented several. Therefore, I conclude that plaintiffs have satisfied the Rule 23(a)(2) commonality requirement.

C. Typicality

Rule 23(a)(3) mandates a determination of whether or not the "claims or defenses of the representative parties are typical of the claims or defenses of the class." *See* Fed. R. Civ. P. 23(a)(3). The typicality inquiry required by Rule 23(a)(3) "is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *See Baby Neal*, 43 F.3d at 57. This inquiry focuses on "whether the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of the class members will perforce be

based." *See id.* at 57-58 (internal quotation marks omitted). The court must, in effect, discern whether potential conflicts exist within the proposed class. *See Baby Neal*, 43 F.3d at 57; *In re IKON*, 191 F.R.D. at 465. Typicality will be found to exist when the named plaintiffs and the proposed class members "challenge[] the same unlawful conduct." *See Baby Neal*, 43 F.3d at 58; *In re IKON*, 191 F.R.D. at 465. "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Baby Neal*, 43 F.3d at 58 (citations omitted); *see also In re Prudential Ins. Co. Am. Sales Prac. Litig. Action*, 148 F.3d at 312 (finding typicality in light of common scheme).

The individual plaintiffs seek to demonstrate that defendants conduct was contrary to the provisions of the KIN Plan, was contrary to the statutory dictates of ERISA, and was contrary to defendants' fiduciary duty to plaintiffs. Their claims are identical to those advanced on behalf of the class, requiring no lesser proof. Although benefit disbursements will vary, such ancillary factual differences will not render the claims atypical where all claims arise out of the same events and course of conduct and are premised on the same legal theory. *See In re IKON*, 191 F.R.D. at 465; *Feret*, 98 U.S. Dist. Lexis 12734 at *34-36. Therefore, I conclude that the claims of the individual plaintiffs are typical of the claims of the absent class members.

D. Adequacy of Representation

Before certifying a class, a court must find that "the representative parties will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). The adequacy of

representation inquiry has two components designed to ensure that the absentee plaintiffs' interests are fully pursued. In order to satisfy the first component, "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees." *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 635 (1999); *In re IKON,* 191 F.R.D. at 466. In order to satisfy the second component, "class counsel must be qualified and must serve the interests of the entire class." *See Amchem,* 521 U.S. at 635; *In re IKON,* 191 F.R.D. at 466. The burden is on the defendants to show the inadequacy of representation of a plaintiffs' class. *See Lewis v. Curtis,* 671 F.2d 779, 788 (3d Cir. 1982).

The named plaintiffs aver that "their respective rights are substantially identical to the rights of all of the other members of the class." *See* 2d Amend. Compl. ¶ 19(d). Lead plaintiffs Clauser and Wollman each served long-tenure with KIN, including service on the KIN Plan Committee. *See* 2d Amend. Compl. ¶ 19(d)(i)-(ii). Lead plaintiff Trippy was employed by KIN for a much shorter time. *See id.* ¶ 19(d)(iii). The right to relief of each lead plaintiff, like that of the absent class members, depends on demonstrating that defendants breached their fiduciary duties, violated the terms of the KIN Plan, and violated provisions of ERISA. Therefore, their interests appear well-aligned with those of the absent class members. Moreover, "[p]laintiffs' counsel has litigated numerous complicated ERISA cases," *see* Pls. Mot. at 14, and appears qualified to prosecute the action on behalf of the class. Therefore, I conclude that plaintiffs have satisfied the requirement of Rule 23(a)(4) that they will adequately represent the class.

II. RULE 23(B): CLASS ACTIONS MAINTAINABLE

Plaintiffs seek certification pursuant to Rule 23(b)(1)(A).[2] In order to maintain a class action under subsection (b)(1)(A), plaintiffs must show that "the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." *See* Fed. R. Civ. P. 23(b)(1)(A). Certification under this subsection constitutes a mandatory class, from which class members may not opt out of the action to "'pursue litigation that might prejudice other class members or the defendants.'" *See Bunnion*, 1998 WL 372644, at *13 (quoting 5 James Wm. Moore, Moore's Federal Practice § 23.40[2] (3d ed. 1998) [hereafter "Moore's"]).

Rule 23(b)(1) is designed to prevent prejudice to the parties arising from multiple potential suits involving the same subject matter. *See* 1 Newberg § 4.03, at 4-10. Rule 23(b)(1)(A) protects the party opposing the class from inconsistent adjudication which may render it subject to incompatible standards of conduct. *See In re IKON*, 191 F.R.D. at 466; *Bunnion*, 1998 WL 372644, at *13. Certification under this subsection is common where it is alleged that the defendants dealt with the class in a "unitary" manner. *See In re IKON*, 191

[2] Plaintiffs suggest that this action may be maintained as a class action under any of the provisions of Rule 23(b). *See* Pl. Mot. at 15-17. The majority of their argument, however, seeks certification under Rule 23(b)(1). *See* id. at 15-16. By letter of July 5, 2000, the court asked plaintiffs to suggest the most applicable subsection of Rule 23(b). By letter of July 7, 2000, plaintiffs' counsel Gerald Berkowitz, Esq., advised the court that certification was sought pursuant to Rule 23(b)(1)(A). Where plaintiffs meet the requirements of Rule 23(a), they need meet the requirements of only one subsection of Rule 23(b) in order for the class action to be maintained. *See In re Prudential*, 148 F.3d at 309; *Feret*, 1998 U.S. Dist. Lexis 12734 at *43 n.19.

F.R.D. at 466 (citing Adv. Comm. Notes to Fed. R. Civ. P. 23(b)(1) (citing breach of fiduciary duty to large class of beneficiaries as example)).

I conclude that plaintiffs' claims are appropriate for certification under Rule 23(b)(1)(A). Plaintiffs have shown that many absent class members have actively monitored the administration of the KIN Plan over the last several years. *See* Pls. Mot. Ex B ¶ 7 (Affidavit of Clauser) (explaining that he helped organize a group of about 140 former employees to monitor the KIN Plan); *id*. Ex. C ¶ 7 (Affidavit of Wollman) (same). The large number of actively interested members reveals a realistic possibility that separate actions would be brought in this case in the absence of a class action. Moreover, plaintiffs seek broad declaratory and injunctive relief in both counts related to defendants' conduct and the terms of the plan. *See* 2d Amend. Compl. ¶¶ 57 & 67. If granted in some actions but denied in others, the conflicting declaratory and injunctive relief could make compliance impossible for defendants. *Cf. In re IKON*, 191 F.R.D. at 466; *Bunnion*, 1998 WL 372644, at *13. Therefore, I will certify the class pursuant to Rule 23(b)(1)(A).

CONCLUSION

Plaintiffs are concerned that defendants have breached a fiduciary duty owed to plaintiffs and have violated the terms of the KIN Pension Plan as well as ERISA. The merits of the matter await determination.

Plaintiffs have moved the court to certify this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. They seek to represent a class of approximately 600

participants and beneficiaries of the KIN Plan. Defendants did not oppose the motion. Having reviewed the record, I will grant the motion to certify the class action. First, I find that the class of approximately 600 plan participants and beneficiaries is so numerous as to render joinder impracticable. Second, the record reveals that several common questions of fact and law exist regarding defendants' obligations to plaintiffs and whether defendant's actions violated the KIN Plan or ERISA rights. Third, the claims of the individual plaintiffs are typical of those of the absent class members as both arising out of the same events and premised on the same legal theories. Fourth, the individual plaintiffs have interests that sufficiently align with those of the absent class members, and have obtained qualified counsel, such that they are adequate representatives of the class. Finally, plaintiffs have shown that failure to certify the class presents a realistic possibility that defendants will be subject to multiple actions which could result in inconsistent adjudication, subjecting them to incompatible or mutually exclusive obligations. Therefore, I conclude that class certification is proper and will grant plaintiffs' motion.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK CLAUSER, JOHN WOLLMAN and VINCENT TRIPPY, individually and on behalf of others similarly situated, Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 99-5753
NEWELL RUBBERMAID, INC., et al., Defendants.	:	

Order

And now, this day of July, 2000, upon consideration of plaintiffs' second amended complaint (Doc. No. 8), and of plaintiffs' unopposed motion for class certification (Doc. No. 12), it is hereby ORDERED AND DECREED that:

1. This action is certified as a class action under Fed. R. Civ. P. 23(b)(1)(A), the class being comprised of:

   All former employees of Koh-I-Noor, Inc. who participated in the Koh-I-Noor, Inc. Pension Plan and who are now participants in a pension plan sponsored by Newell Rubbermaid, Inc., or an affiliate thereof, as a result of the merger of the Koh-I-Noor, Inc. Pension Plan with a pension plan sponsored by Newell Rubbermaid, Inc., or an affiliate thereof; and

2. The court expressly reserves the right, pursuant to Federal Rule of Civil Procedure 23(c)(1) & (4) to reassess both the class definition and certification as the litigation proceeds, until such time as final judgment is entered.

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William H. Yohn, Jr., Judge